Hillside Avenue Pharmacy, Inc. *and* **Donald Barbakoff** *and* **Brian Loftman** *and* **District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, Department Store Union, AFL-CIO.** Cases 29-CA-8595, 29-CA-8727-2, 29-CA-8727-1, and 29-RC-5255

December 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 14, 1982, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

Member Jenkins agrees that Donald Barbakoff was unlawfully discharged by Respondent but disagrees with the remedy provided to him. In our opinion, the Administrative Law Judge struck a proper balance in this particular situation after considering the nature of the misconduct engaged in by both parties. Member Jenkins has placed the blame entirely on Barbakoff and has ignored the "contribution" of Sugarman to this sorry state of affairs. There is no denying that Sugarman discharged Barbakoff in violation of Section 8(a)(3) of the Act. Furthermore, Sugarman contested Barbakoff's application for unemployment compensation when he had no apparent reason to do so. Additionally, Sugarman, by his own conduct, intentionally placed himself in a physically dangerous position by blocking Barbakoff's car with his body.

This is not to say that we condone the conduct of Barbakoff—we are as chagrined by his behavior as we are by that of Sugarman. Accordingly, we must, in situations such as this, consider the severity of the misconduct engaged in by both parties in fashioning the appropriate remedy.[3] Member Jenkins has, in our view, failed to do this.

This is not a situation in which Barbakoff's discharge was the immediate provocation for his behavior. Almost 2 weeks had elapsed between the date of his discharge and the date of his confrontation with Sugarman. Thus, it was Sugarman's conduct in denying Barbakoff's unemployment compensation claim, rather than the actual discharge, which provoked Barbakoff to return to see Sugarman. The conduct of both men, therefore, flowed only indirectly from the unfair labor practice. Barbakoff's anger at Sugarman's denial of his claim was not surprising, but that is not to say that it formed a legitimate basis for what happened next. The subsequent childish behavior of both men was not acceptable conduct under any circumstances. Thus, the remedy here takes into account the behavior of both parties, with particular consideration given to the nature of the provocation and the reaction thereto. Accordingly, under the provisions of the remedy, neither party will shoulder the entire blame for his individual misconduct. Member Jenkins has given us no compelling reason for this Board to provide otherwise.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Hillside Avenue Pharmacy, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In accordance with our decision in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), the Administrative Law Judge's recommended Order is being modified to require Respondent to expunge from its files any reference to the discharge of Donald Barbakoff on January 24, 1981, and to notify him of such, once done.

[3] See *Fairview Nursing Home*, 202 NLRB 318, fn. 36 (1973). The Board adopted the Administrative Law Judge's comments on the need for a "balancing test" in cases such as this. The Administrative Law Judge reasoned that "the employer ought not to be allowed, as a matter of course, to profit from his own wrongful misconduct and be wholly exonerated from the Act's sanctions because the employee likewise was at fault."

[4] Member Jenkins claims that the Board has not engaged in a "selective forfeiture" of our remedies where the misconduct of both parties has been considered. Our reading of the cases cited by Member Jenkins reveals that this is not an entirely accurate statement. In *O. R. Cooper and Son*, 220 NLRB 287 (1975), an unlawfully discharged employee destroyed company property and eventually pleaded guilty to this crime. The Board determined that he had forfeited his right to reinstatement but not to backpay. The Board noted that, although it could not ignore the misdeeds of the employee, neither could it allow the employer to violate the Act with impunity.

In *Montgomery Ward & Co., Incorporated*, 254 NLRB 826 (1981), the Board found that an employee who had stolen property from his employer had, by his own misconduct, forfeited his right to reinstatement. However, the Board awarded him backpay from the date of his discharge to the date he admitted to having stolen property, reasoning that to withhold backpay would allow the employer to benefit directly from its own misconduct.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of Donald Barbakoff on January 24, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, dissenting in part:

My disagreement with the majority in this case is limited to the nature of the remedy accorded to discriminatee Donald Barbakoff. Subsequent to his unlawful discharge, Barbakoff had a confrontation with Respondent's president, Gerald Sugarman, which deteriorated into an argument and ended with Sugarman being endangered by Barbakoff's use of an automobile. As a result of the misconduct engaged in by both parties, the Administrative Law Judge recommended, and the majority has accepted, a modification to the remedy normally awarded unlawfully discharged employees. Under their order, Respondent is not required to reinstate Barbakoff, but will be obligated to provide him with backpay until he has obtained substantially equivalent employment.

However, if Barbakoff's misconduct is sufficiently egregious to warrant the forfeiture of a reinstatement remedy, logic commands that such misconduct serve to deny him all further relief, including additional backpay subsequent to such postdischarge misconduct. If the discriminatee's misconduct is insufficient to deny him backpay, he should be reinstated.[5] In prior cases, the Board has not engaged in selective forfeiture of our remedies where misconduct by both parties has been weighed.[6] The majority and the Administrative Law Judge have not explained why this case should be an exception, and I am unable to provide them with a rationale.

In fashioning this hybrid remedy, the majority has provided Barbakoff with a curious remedy. Should Barbakoff be unable to find substantially equivalent employment, his backpay award will remain open-ended. I fail to understand how this possibility serves as a sanction for postdischarge misconduct.

An additional curiosity arises because, subsequent to the misconduct herein, Barbakoff attempted to vote in a representation election. His ballot was challenged and is now determinative of the election results. The Administrative Law Judge found him ineligible because he was not entitled to reinstatement and therefore was not employed on the date of the election. The shortcoming of this analysis is that Barbakoff, under the Board's remedy, well may be entitled to backpay through the date of the election. If he is entitled to backpay on the date of the election, there is no basis for denying him eligibility to vote. It is elementary Board law that a discriminatorily discharged employee, not employed on the date of the election, is eligible to vote.[7]

[5] These alternatives may be chosen only as a result of balancing the severity of each party's misconduct, including acts or provocation. Accordingly, there is no basis for the majority's contention that I am hereby seeking to place all of the blame on the discriminatee herein.

[6] *Northern States Beef, Inc.*, 234 NLRB 921 (1978); *C. K. Smith & Co., Inc.*, 227 NLRB 1061, 1075 (1977); *O. R. Cooper and Son*, 220 NLRB 287, fn. 1 (1975). See also *Montgomery Ward & Co, Incorporated*, 254 NLRB 826 (1981). As stated above, a finding of postdischarge egregious misconduct terminates backpay liability only prospectively. Contrary to the majority's claims, the backpay liability in *O. R. Cooper*, and *Montgomery Ward* was limited in precisely this manner, so as not to be applicable to periods after the misconduct or the admission thereof. Consistent with the cited cases, I would not unduly penalize the dischargee or provide a windfall to the wrongdoer by wholly eliminating backpay liability, even prior to the misconduct.

[7] *Corn Brothers, Inc.*, 262 NLRB 320 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate our employees as to their support for District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, Department Store Union, AFL-CIO.

WE WILL NOT promise wage increases or other benefits to our employees to induce them to withdraw their support for the Union.

WE WILL NOT threaten to discharge any of our part-time employees, to close our store, to reduce employee working hours, or to refuse requests by employees for time off in order to discourage our employees from joining or supporting the Union.

WE WILL NOT grant extra purchasing discounts to our employees to induce them to vote against the Union.

WE WILL NOT create the impression among our employees that we are keeping their union activities under surveillance.

WE WILL NOT request our employees to keep us informed as to union activities among them or extract promises from them to vote against the Union.

WE WILL NOT reduce the work hours of any of our employees or discharge any employee

to discourage membership in or activities on behalf of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees with respect to the exercise by them of any of the rights guaranteed them under Section 7 of the Act.

WE WILL make whole Brian Loftman for all losses of pay he suffered resulting from our having reduced his working hours because of his activities in support of the Union and WE WILL make whole Donald Barbakoff for all losses of pay he suffered as a result of our having discharged him because of his union activities, with interest.

WE WILL expunge from our files any reference to the discharge of Donald Barbakoff on January 24, 1981, and WE WILL notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

HILLSIDE AVENUE PHARMACY, INC.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: On January 12, 1981 (all dates hereafter are for 1981 unless indicated otherwise), District 1199, National Union of Hospital and Health Care Employees, R.W.D.S.U., AFL-CIO (herein called the Union), filed a petition in Case 29-RC-5255 pursuant to the provisions of Section 9 of the National Labor Relations Act, as amended (herein called the Act). The Union thereby sought an election among the employees of Hillside Avenue Pharmacy, Inc. (herein called Respondent), to decide if they wanted the Union to represent them for purposes of collective bargaining. On February 27, pursuant to a Stipulation for Certification Upon Consent Election approved on January 26, a secret-ballot election was held among Respondent's employees. As discussed below, the vote cast by Donald Barbakoff is determinative of the outcome of that election. Further, the Union filed objections to the conduct of the election alleging that the Respondent, by various acts, interfered with the holding of a fair election. On July 20, the Board issued a Decision and Order Remanding for Hearing whereby it directed that a hearing be conducted to determine whether or not Barbakoff's ballot should be counted and whether or not the results of the election should be set aside because of the alleged acts of interference.

On January 26 Donald Barbakoff filed the unfair labor practice charge in Case 29-CA-8595 alleging that Respondent had discharged him on January 24 because of his activities on behalf of the Union and that it had in other ways violated the rights of its employees which are guaranteed them under Section 7 of the Act. On March 10, a complaint was issued in that case which alleged that Respondent violated Section 8(a)(1) and (3) of the Act by having assigned Donald Barbakoff to more arduous and less agreeable job tasks on and since January 12 and by having discharged him on January 24—both because of his having supported the Union. The complaint in that case also alleged that Respondent, by its president, Gerald Sugarman, interrogated its employees as to their activities or support for the Union, promised and granted benefits to them to induce them to vote against the Union, and that those acts were violative of Section 8(a)(1) of the Act. Respondent's answer to the complaint placed those allegations in issue.

On March 16, the Union filed the unfair labor practice charge in Case 29-CA-8727-1 on which a complaint issued on April 22. The complaint alleged that Respondent committed acts of additional unlawful interrogation of employees, of promising and granting benefits to them to discourage them from supporting the Union, and of creating the impression with them that their union activities were under surveillance by Respondent—all in asserted violation of Section 8(a)(1) of the Act. The complaint further alleged that Respondent violated Section 8(a)(1) and (3) of the Act by having harassed its employees by preventing them from bringing their lunches to work and by throwing out their lunches. Respondent's answer placed those contentions in issue.

On March 16, Brian Loftman filed the unfair labor practice charge in Case 29-CA-8727-2. On May 8, a complaint was issued in that case to allege that Respondent violated Section 8(a)(1) of the Act by having threatened to discharge its employees and to close its store in order to dissuade them from supporting the Union and that Respondent, in violation of Section 8(a)(1) and (3) of the Act, searched its employees' smock jackets on February 6, required them in early March to bring in doctors' notes when absent due to illness, and cut the employment hours of employee Brian Loftman on March 1—all because these employees supported the Union. Respondent filed its answer which placed those complaint allegations in issue.

On November 3, Cases 29-RC-5255, 29-CA-8598, 29-CA-8727-1, and 29-CA-8727-2 were consolidated for hearing. The hearing was held before me in Brooklyn, New York, on November 18 and December 7.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Based upon the pleadings as amended, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization as defined in Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent operates a retail pharmacy in the Borough of Queens, New York City, where it sells pharmaceuticals and miscellaneous merchandise, including greeting cards. Its president, Gerald Sugarman, is a registered pharmacist and is in charge of the day-to-day operations there. About 15 employees work there, including pharmacists. These employees were unrepresented for purposes of collective bargaining.

B. *The Union's Organizing Effort*

In late December 1980, the Union received a call from Donald Barbakoff, Respondent's pharmacist at the time. A union meeting was arranged for early January at the apartment of one of Barbakoff's coworkers. As discussed *infra*, the Union obtained signed authorization cards from virtually all of Respondent's employees by about the end of the first week in January. Up to that point, there is no evidence or contention that Respondent had any knowledge, express or implied, of the Union's organizational efforts or of the employees' interest in the Union.

On January 7, the Union sent a letter to Respondent to notify it that one of its representatives was coming to Respondent's store to speak with its president about securing recognition as the employees' collective-bargaining representative and for the purpose of negotiating a contract.

C. *Alleged Violations Other Than Those Pertaining to Alleged Discrimination Against Barbakoff*

In this section, there are discussed the allegations of unlawful interrogation of employees, of unlawful promises and grants of benefits, of creating the impression of surveillance of employees' activities for the Union, and of discrimination in requiring employees to bring in doctor's notes, in reducing their working hours, and in barring them from bringing in their lunches. The allegations pertaining to discrimination against Donald Barbakoff is discussed in a separate section, below. All of the allegations discussed now are alleged to have occurred at various times from January 9 (the date when Respondent received the Union's letter of January 7, discussed above) to early March. The testimony of the witnesses called by the General Counsel respecting the alleged violations discussed now is set out separately for each witness, together with corroborative or countervailing testimony where applicable. The first witness called by the General Counsel was Respondent's president, Gerald Sugarman, who was examined under rule 611 of the Federal Rules of Evidence.

1. Sugarman's testimony under Section 611

He acknowledged, as set out in a prehearing affidavit he had signed during the administrative investigation of this case by the General Counsel, that he had asked pharmacist, Donald Barbakoff, on January 9 whether Barbakoff was a member of a union and that, shortly afterwards, he told employee Brian Loftman that he heard that Loftman was going to vote for the Union.

2. The testimony of Claude Ferrara

On January 10, according to the testimony of Claude Ferrara, the Union's area director, he visited Respondent's store and asked its president, Sugarman, for recognition. Ferrara related that Sugarman declined and said that it was very important for him to know whether his pharmacist (i.e., Barbakoff) had signed a card for the Union. Ferrara testified that he told Sugarman that all that he, Ferrara, can say to him is that a majority of the employees signed cards for the Union. Respondent, during its case, called Sugarman as a witness. He testified in substance that Ferrara's account of their February 10 meeting was basically accurate "except for one item." According to Sugarman, it was "untrue" that he had asked Ferrara if the pharmacist, Barbakoff, had signed a union card. I credit Ferrara's account as it was direct and equivocal and as Sugarman had already expressed interest in learning where Barbakoff's sympathies lie and he had conceded that he had asked Barbakoff if he was a union member. Sugarman's statement as to Ferrara's account respecting the inquiry about Barbakoff's having signed a union card is essentially a general denial and leaves open a question in my mind as to whether Sugarman was also denying that he had made any reference to "his pharmacist" when talking with Ferrara on January 10. In making the foregoing credibility resolution, I also note that Respondent exhibited union *animus* at other times as discussed in detail below.[1]

3. The testimony of Thomas Hall

Thomas Hall worked in Respondent's pharmacy from mid-December 1980 until he quit in early March. He attended the union meeting in early January at a coworker's home. He testified that, about 2 weeks after that meeting, Respondent's president, Sugarman, approached him and told him that a "vengeful person" was out to hurt him by trying to bring a union in. Hall testified that Sugarman asked him what he knew about it and that he responded that he knew nothing. Hall testified that Sugarman told him to let him know if he found out anything and then said, "Those who make my life easier will be rewarded later." Hall testified that he did not respond to that remark. Sugarman, in response to a leading question, denied telling Hall that those who make his life easier will be rewarded. I credit Hall's version. He did not strike me as one who would conjure up such a discussion. Further, Sugarman's denial was a summary one, given in response to a leading question and is thus entitled to little weight. Also, he did not deny having asked Hall then what he knew about the effort to bring in the Union.

Hall testified also as follows as to an incident on February 20. He walked into the stockroom on that day and heard the word "union." Sugarman was there talking with another employee, Larry Clay. As Hall backed out to leave, Sugarman called for him to stay and said that

[1] It is not clear whether the General Counsel has alleged that the interrogation of Ferrara itself is violative of the Act or whether his testimony was offered only in connection with the alleged unlawful discharge of Barbakoff. Both matters are dealt with *infra*.

he was trying to talk some sense into Clay. Sugarman asked Hall to see what he could do with Clay. Hall then told Clay that the Union would cost a lot of money and that he would never get out of it all the money he would put in. Clay left. A few minutes later, while Hall and Clay were out in the prescription area, Sugarman said to them, "If the Union comes in, I will have to let some of the part-timers go, or I will go under." Hall testified that those were Sugarman's exact words.

Clay did not testify at the hearing.

Sugarman was asked by Respondent's counsel whether he ever said to Hall that "if the Union comes in, he'll have to let the part-timers go or he would go under." In response, Sugarman testified that he had never said that. He did not make any references to any other aspect of Hall's testimony respecting remarks made among Hall, Clay, and himself. I credit Hall's account as it seems unlikely that he would readily fabricate an account of a meeting held in a stockroom with another employee present. Sugarman's denial, given in response to a leading question, fails to carry any real rebuttal weight.

Hall testified further that, in mid-February, Sugarman asked him how he intended to vote and that he responded that he had not decided. Thereupon, according to Hall, Sugarman stated that he hoped that Hall would make his life easier and that those who do so will be rewarded. Hall further testified that Sugarman again asked him how he would vote, that Hall then answered that he would definitely vote against the Union, and that Sugarman said that he hoped that Hall would think about all that Sugarman could do for him. Hall also testified that, about 15 minutes before the election on February 27, Sugarman came over to him and asked him, in the presence of one of Respondent's attorneys, how he was going to vote and that Hall replied that he would vote against the Union. Hall in fact had been told by the Union a week previously that he had been designated to be the Union's observer at the election and he served in that capacity at the election.

Sugarman denied asking Hall at any time how he intended to vote or having told him that those who make his life easier will be rewarded. Sugarman also testified that, about 15 minutes before the election started on February 27, he was with his attorney when Hall walked towards him. Sugarman testified that he thought Hall was wearing a badge and that Sugarman then said, "I notice you're going to be the Union's observer." Hall's response, according to Sugarman, was, "Yes, but I'm still voting for you." The attorney who represented Respondent did not testify. I credit Hall's account as it is unlikely he created it for the hearing and as Sugarman's account in part confirms Hall's version, in that Hall told Sugarman he would vote against representation although Hall was also the Union's observer at the election.

Hall testified without contradiction that, just after the election, Sugarman said, "I feel so bad," which I construe as a statement that he was very disappointed in the election result.

Hall also testified that on March 1 he and employee Brian Loftman arrived for work and observed that the store's window had been broken. Sugarman, according to Hall, said that the Union had broken the window. Hall testified that he then told Sugarman that it was not fair of him to blame the Union. At that point, according to Hall's testimony, Sugarman together with his wife began screaming at him and Mrs. Sugarman then said that if the Union got in the store would be closed.

The General Counsel called Brian Loftman as a witness and his account substantially corroborates Hall's account as to the March 1 incident.

Mrs. Sugarman testified for Respondent but her testimony made no reference to the March 1 incident. The same observation is made as to the testimony given by Gerald Sugarman.

As Hall's account was corroborated in substance by Loftman's testimony and is uncontroverted by Respondent, I credit it.

4. The testimony of Maria Kaufman

Maria Kaufman worked for Respondent at various intervals over the past 12 years. Her last period of employment with Respondent began in January 1980. She has worked as a cashier, stock clerk, and bookkeeper. She testified that shortly after the Union gave notice to Respondent that it was organizing the employees, Sugarman asked her if she would vote for the Union and that she told him she would not. She testified that, in late January, he asked her if she felt the same way and she responded that she did.

She also testified that, on the day of the election, Sugarman gave her her paycheck and said to her as he did, "You know that there will be $10 or $15 or $20 out of this check if the Union comes in."

Sugarman, in answer to a leading question, denied that he ever asked Kaufman how she intended to vote. He did not allude to her testimony as to their discussion on February 27.

I credit Kaufman's account as she gave it in a straightforward manner, as Sugarman denied only part of it and did so only in a summary manner and as Sugarman himself acknowledged that her account of another incident in serious controversy was reliable.[2]

The complaint alleged that Respondent searched employees' smock pockets to discourage their support for the Union. In support thereof, Kaufman testified that, on one occasion in March, Sugarman confronted her and angrily demanded that she empty out the pockets of her work jacket and that, when she did so, he picked out a scrap piece of paper she had placed there and he left. Sugarman testified he had written a telephone number on a piece of paper and taped it to a machine located in the vicinity of Kaufman's work station. He testified that he asked her to let him see the contents of her pockets, that she then emptied the pockets, and that he then located the missing telephone number on the piece of paper he was looking for, which was among the items in her jacket.

[2] That other incident pertained to the confrontation between Sugarman and Barbakoff on February 6, discussed in a separate section.

5. The testimony of Brian Loftman

Loftman worked for Respondent as a cashier from January 8 to early March.[3] He signed a union card in mid-January. He testified that, at that time, Sugarman told him that someone was trying to bring a union in and that he should not get involved in that matter. Late in January, according to Loftman, Sugarman asked him how he would vote if there was a union and he answered that he did not know. Loftman said he explained to Sugarman that he was covered by his parents' medical insurance. Loftman testified that Sugarman then told him he would not need the Union. On another occasion, according to Loftman, Sugarman asked a coworker, Dominic Mellone, to tell Loftman how he intended to vote. Mellone proceeded to tell Loftman that Mellone had medical coverage from his regular job as a carpenter and that he did not need the Union. At that, according to Loftman, Sugarman said that they were both in the same boat and Sugarman then asked Loftman how he would vote. Loftman answered that he would vote against the Union.

Sugarman testified that he had talked to Loftman about the Union on one occasion and told him he had heard a rumor that Loftman intended to vote for the Union because an employee had told Loftman that the Union would give him better medical coverage. According to Sugarman, he showed Loftman documentary evidence that the other employee had turned down a raise several months previously. Sugarman related that Loftman simply volunteered that he was voting against the Union. Sugarman also testified that on one occasion he told Loftman that, if he joined a union, he would have to pay dues.

I credit Loftman's account as it was detailed, appeared to be candid, and was uncontroverted on its specific points.

Loftman testified also that, on February 23, he obtained antibiotics and creams from Sugarman as prescribed by his doctor. Sugarman, according to Loftman, then asked him if he was still voting against the Union. He responded that he was. Sugarman then, according to Loftman, told him he was giving him a break, that the antibiotics alone would cost $22 but that he would have to pay only a total of $12 for the antibiotics and the creams. Loftman also testified that the usual employee discount was 6 percent.

Sugarman testified that employees get one-third off as a discount, that he did not give Loftman a rate better than that, that he never gave Loftman a discount as a reward for assurances that Loftman would vote against the Union and that he never asked Loftman how he would vote.

I credit Loftman's account respecting the February 23 incident as it was detailed, as Respondent did not expressly deny the testimony of Loftman which indicates that the discount given him was greater than one-third, and as Respondent offered no documentary evidence to rebut Loftman's testimony. I credit Loftman's testimony that the regular discount for employees was 6 percent, not 33-1/3 percent.

Loftman also testified that, on one evening in January, Sugarman told him that, if he needed time off from work, that could be arranged but that it could not be done if the Union got in. Loftman further testified that Sugarman also told him that if the Union got in he would have to lay off the part-time employees or close the store. Sugarman, in his testimony, did not allude to or controvert specifically that testimony of Loftman. I credit Loftman's account.

Lastly, Loftman testified respecting the allegation that his hours of work were reduced because of his support for the Union. He testified that, after February 27, he was earning only $51 a week instead of $80, the amount he earned before the election. In response, Sugarman testified that he increased Loftman's "normal" workweek from 15 hours to 20 hours on February 1 because Loftman asked for extra hours and that he decreased Loftman's hours back to 15 on March 1 because Sugarman did not need him for those extra hours.

6. The testimony of Dolores Bates

Bates testified that, on the day of the election, Sugarman threw her lunch bag in the garbage when she left the store to buy a soft drink. Sugarman testified that he had assumed that someone had left a stale lunch behind and that he threw it away by mistake. Bates acknowledged under the circumstances a mistake was possible.

7. The testimony of Brook McShalo

McShalo began working for Respondent on March 28, 1980, as a clerk, cashier, and stocker and left Respondent's employ in April. He signed a union card in January. In late January, according to his testimony, Sugarman asked him if he had signed a union card. He denied doing so. McShalo testified that Sugarman then said, "Yes, you did." Following that discussion, according to McShalo, Sugarman asked him to promise not to vote for the Union and McShalo told him he would not vote for the Union. McShalo testified further that, at various times in February, Sugarman promised him wage increases and medical coverage and told him that he would have to close the store on Sundays and holidays and that he could not afford a union.

McShalo also related that, on the day of the election, Sugarman told him that his paycheck would be $15 less if the Union were to come in.

Lastly, McShalo testified that, prior to the election when he called in sick, Sugarman simply said he hoped McShalo would feel better. McShalo testified that he was out sick for 1 day about 4 days after the election and that, when he returned to work, Sugarman asked him for a doctor's note. McShalo told him he would get one. The matter was not pursued further.

As McShalo's account is substantially uncontroverted, I credit it.

D. *Alleged Discrimination Against Barbakoff*

The General Counsel contends that Donald Barbakoff, Respondent's pharmacist, was assigned more onerous duties in mid-January because of his union activities and

[3] He left Respondent's employ then when questions were raised as to whether he had properly handled two transactions. Respondent urges that his testimony should be rejected in its entirety in view of those matters. Testimony as to those transactions was considered only in evaluating Loftman's attitude towards Respondent in testifying.

that he was discharged from Respondent's employ on January 24 for the same reason. Respondent asserts that it never assigned Barbakoff to less agreeable tasks. It denies too that it discharged him and contends that Barbakoff quit his employment on January 24.[4]

The testimony is clear that Barbakoff had worked briefly for Respondent about 20 years ago when he was in college. After graduating from pharmacy school, Barbakoff had worked at different pharmacies and, for a period of time, he owned his own drugstore. On November 30, 1980, he telephoned Respondent in answering an advertisement in the New York Times. Sugarman recognized his voice and hired him immediately.

Although the complaint alleges that Barbakoff was given more onerous, less agreeable work assignments because of his union activities, his testimony indicates that the work assignments he received were not changed at any time. Rather, he testified that Sugarman's attitude towards him changed markedly on the advent of the Union. Barbakoff testified that Sugarman was, from the outset of Barbakoff's employment, "very picky" about how Barbakoff kept the record books and how he performed his other duties. Barbakoff further testified that the change he experienced on the advent of the Union was not that his duties changed but rather that Sugarman's attitude toward him was openly hostile.

Sugarman denied that he had shown any antagonism to Barbakoff at any time.

Other employees testified as to Sugarman's temperament. One characterized it as "sweet and sour"; another related that Sugarman treated the employees as children by "screaming and hollering" at them. Barbakoff testified that, although Sugarman was always friendly toward him in December 1980, he interested his coworkers in the Union because he was distressed with the way Sugarman was treating them. Barbakoff did not impress me as so thoroughly altruistic.

The objective evidence indicates that Sugarman's attitude toward Barbakoff had changed before Barbakoff had approached the Union. In that regard, Respondent put in evidence an advertisement Sugarman placed with the New York Times on the day before the Union made its first contact with him. The ad was for a full-time or part-time pharmacist who "must be happy."[5] From the overall testimony I find that the General Counsel has not shown that Barbakoff was assigned at any time to more onerous, less agreeable tasks or that Sugarman's attitude in making work assignments to him changed after the Union appeared on the scene. The evidence indicates instead that Sugarman's "very picky" instructions began to irritate Barbakoff in mid-December 1980 and that it was as a result of that conduct that Barbakoff began to interest his coworkers in having a union represent them.

Barbakoff testified that he spoke to the employees in December 1980 and urged them to join a union and that he called the Union in late December 1980. The Union's area director also testified that he talked with Barbakoff in late December 1980 about organizing Respondent's employees.

In early January, a union meeting was held at the apartment of one of Barbakoff's coworkers. The meeting was attended by several employees, including Barbakoff. Barbakoff testified that he obtained signed authorization cards for the Union for all but one of Respondent's employees.

As related above, the Union sent a letter dated January 7 to Respondent which was received January 9. Barbakoff testified that Sugarman "turned red" when he opened and read that letter and that Sugarman left the store then for a 20-minute period. When he returned, according to Barbakoff, Sugarman asked him to promise that he would not go along with the Union. Barbakoff testified that he told Sugarman that he could not do that as he firmly believed that the Union would be the best thing for the employees because Sugarman treats them in a "despicable" way. Sugarman testified that, when he received the Union's letter, he read it to Barbakoff and asked him if he knew anything about it and that Barbakoff replied that he did not. Sugarman testified that he then asked Barbakoff if he was a member of the Union and that Barbakoff said he was not.

For purposes of deciding the issues in this case, it is not necessary to determine whether Barbakoff's account is more probably true than Sugarman.[6]

Barbakoff's last day of employment with Respondent was January 24, a Saturday. There is a sharp credibility issue as to whether he was discharged that day, as the General Counsel contends, or whether he quit, as Respondent asserts.

Barbakoff testified as follows as to January 24. He reported for work as normal on January 24 and that Sugarman reviewed with him at or about 6 p.m. various asserted deficiencies in Barbakoff's work performance. At one point, according to Barbakoff, he told Sugarman that he would try to follow Sugarman's detailed instructions to the letter, as Sugarman wished, but that he could not guarantee that he would do so as he did not see any reason for such minute rules. At that point, according to Barbakoff, Sugarman told him that they would have "to

[4] Some of the questions asked by Respondent of Barbakoff suggested to me that it might contend that Barbakoff was a supervisor as defined in the Act or that he was a managerial employee, not protected by Sec. 7 of the Act. As it developed, Respondent has not raised any such contentions and neither was litigated. In any event, the record evidence discloses that Barbakoff transmitted routine directions to his coworkers and that he neither possessed nor exercised any genuine managerial discretion in his job. Rather, he performed the functions of a professional employee as he was a registered pharmacist.

[5] Sugarman's explanation for having placed that ad makes little sense. He stated he placed it as a favor to Barbakoff. Barbakoff testified that he asked Sugarman in early December to arrange his schedule so that he would be off duty every other weekend. Were the ad seeking only a part-time pharmacist, I could begin to understand Sugarman's explanation but that ad was for a full-time pharmacist. Further, Sugarman did not explain why he waited a month to place the ad or why he expressly sought a pharmacist who "must be happy." I suspect Sugarman may have been aware of Barbakoff's union activities when the ad was placed but the General Counsel does not so contend.

[6] Were it necessary I would credit Sugarman's account as it contains admissions against interest and as it seems unlikely to me that Barbakoff could have suddenly commented to Sugarman about any "despicable" conduct, particularly in view of Barbakoff's other testimony that the relationship then between himself and Sugarman was "kissy-kissy," as Barbakoff himself termed it.

definitely part company." Barbakoff asked if he were "fired" and that Sugarman, in response, said he did not like to use that term. Sugarman then, according to Barbakoff, instructed his wife to make up Barbakoff's paycheck, which was given him and he then left the premises about 2 hours before closing time.

Sugarman testified as follows respecting January 24. He let Barbakoff go home early on January 24 because Barbakoff had worked beyond closing time on earlier occasions. Sugarman related that when he told Barbakoff on January 24 that he could leave early, Barbakoff was happy. As Barbakoff was leaving, Sugarman asked him about some returned items. When Barbakoff gave him a very casual response, Sugarman told Barbakoff that his work is getting worse and worse. Barbakoff told him to "bug off." Sugarman asked if anything was bothering Barbakoff. Barbakoff responded, "Stop mouthing off. I quit."

Mrs. Sugarman testified that the only part of that conversation she heard distinctly was Barbakoff saying, "Stop mouthing off. I've had enough. I quit." At that Barbakoff's paycheck was made out and given to him.

Barbakoff filed the unfair labor practice charge in Case 29-CA-8595 on Monday, January 26, alleging his discriminatory discharge on January 24. After a hearing before the New York state department of labor, a decision issued whereby it was held that the "weight of the substantial evidence supports [Barbakoff's] contention that he had been told that it was time for him and [Respondent] to part company" and that Barbakoff "did not voluntarily leave his employment without good cause."

I credit Barbakoff's account. It is not likely that Barbakoff would have quit his employment so soon in the organizing drive he had initiated. Respondent argues that Barbakoff had simply been unable to adjust to taking orders after having been in business for himself and that it was not unlikely that he made the sudden decision to quit. That explanation certainly is a possibility but, in my judgment, it is not probable. That explanation is weakened by the further unlikelihood that Barbakoff abruptly would have resigned his employment moments after Sugarman had supposedly told him that he could go home early, as an expression of gratitude for Barbakoff's having worked overtime on previous days.

E. *The February 6 Incident*

Respondent adduced evidence at the hearing to show that, on February 6, Barbakoff had intentionally struck Sugarman with his automobile. That evidence was offered to establish that Barbakoff had, by such misconduct, forfeited any right he might have had to reinstatement to his former position with Respondent. The General Counsel indicated that he was prepared to address that issue. The testimony thereon offered another credibility conflict for resolution.

Sugarman's account is as follows. Barbakoff came to the pharmacy on February 6 in a state of hysteria and demanded that Sugarman step outside. Barbakoff left the store and a few minutes later Sugarman went outside to talk to Barbakoff. Barbakoff was sitting in his car which was in the driveway. Sugarman knocked on the window on the passenger side of the car to get Barbakoff's attention. Barbakoff signaled him to walkin front of the car to come to the driver's side. Sugarman did so and as he passed in front of the car, Barbakoff put the car in forward gear. The car struck Sugarman with such force as to toss him onto the hood of the car. Barbakoff raced the car out onto the adjacent six-lane street and swerved abruptly such that Sugarman was thrown off the car in front of oncoming traffic which stopped without hitting him.

Barbakoff's testimony as to the February 6 incident is as follows. He visited the pharmacy that day to explain to Sugarman that he had no reason to contest Barbakoff's unemployment compensation claim as the payments were not to be charged against Respondent's account. He asked Sugarman to come outside where they could discuss the matter privately. Sugarman agreed to do so. Barbakoff waited outside and when Sugarman failed to appear, he walked to his car. As he was leaving in his car, Sugarman came out of the store and stationed himself in front of the car. Barbakoff stopped his car. Sugarman walked to the side of the car. At that point, Barbakoff put the car in gear to leave. Sugarman then leapt onto the hood of his car and before Barbakoff could slow the car down, the car was out on Hillside Avenue. Barbakoff stopped the car and Sugarman fell off.

Maria Kaufman testified as follows. She observed the incident from inside the store. Barbakoff and Sugarman were talking excitedly outside. Then Barbakoff walked away to go to his car. A short while later, Sugarman stood in front of the car as it approached the driveway. Barbakoff stopped the car. Sugarman, in a belligerent attitude, folded his arms and positioned himself at the front of the car with his posterior resting on the front grille. Barbakoff edged the car forward. Sugarman tried to hold it back with his body stance. Then she observed Sugarman was straddling the hood and being driven out onto Hillside Avenue where he fell off when the car stopped.

Kaufman testified for the General Counsel. Sugarman, in his testimony, stated that he had asked her to be a witness to the event and he also testified that the account she gave of the incident was substantially accurate.

I credit Kaufman's account and reject Sugarman's version and also Barbakoff's version. I do not accept Barbakoff's testimony that Sugarman leapt suddenly onto the hood of a moving vehicle as it is unlikely that a man of Sugarman's years would have that agility. Neither do I accept Sugarman's account that he was tossed onto the hood when the car had been stopped a foot or so away from him when he crossed in front of it, according to his version. It is more likely that, at most, the car would have but bumped him, in the manner recounted by Maria Kaufman.

From the overall testimony and from especially Kaufman's account, I conclude that Sugarman physically blocked the egress of Barbakoff's car and that Barbakoff then sought to push him out of the way but that Sugarman resisted. A fair inference as to what happened then is that Barbakoff kept the car moving ahead slowly and that Sugarman, who would not give up, then stepped up onto the bumper of the car and straddled the hood. I be-

lieve Barbakoff took up the challenge, and gave him a short ride with an abrupt end.

F. *Analysis*

1. Matters other than alleged discrimination against Barbakoff

The credited evidence discloses that Respondent, by its president, Gerald Sugarman, asked:

(a) Donald Barbakoff on January 9 if he were a union member.

(b) Thomas Hall in mid-January what he knew about the Union.

(c) Hall in mid-February and on February 27 how he intended to vote.

(d) Maria Kaufman in mid-January and in late January if she would vote for the Union.

(e) Brian Loftman in late January, in early February, and on February 23 if he would vote for the Union.

(f) Brooks McShalo in late January if he signed a union card.

The credited evidence also shows that Sugarman: (a) effectively promised benefits to employees by telling Thomas Hall in mid-January when discussing the Union, that those who made his life easier will be rewarded and by making substantially the same comment to Hall in mid-February, and (b) promised McShalo wage increases and medical benefits at various times during February, while urging him to reject the Union.

The credited testimony further reveals that Sugarman threatened employees to discourage their support for the Union when he: (a) told employees Hall and Clay on February 20 that if the Union came in, some of the part-time employees would be let go; (b) told Maria Kaufman on February 27 that, if the Union came in, her paycheck would be reduced by $10, $15, or $20; (c) told Brian Loftman in January that, if the Union got in, he could not be given time off from work and that the part-time employees would be laid off or the store would be closed; (d) told McShalo in late January, while informing him that he could not afford the Union, that he would have to close the store on Sundays and holidays; and (e) told McShalo on February 27 that his paycheck would be $15 less if the Union were to come in.

The evidence also demonstrates that Sugarman, while urging Brian Loftman on February 23 to reject the Union, gave him an unusually large discount in the price he paid for prescriptions and creams he received that day.

The uncontroverted evidence establishes that Sugarman approached Loftman on January 9 and told him that he learned that Loftman was going to vote for the Union; Sugarman also corrected McShalo in late January when McShalo denied that he had signed a card for the Union when Sugarman told McShalo then that he had in fact signed a union card. It is evident from the foregoing that Respondent, by Sugarman, left the impression with the employees involved that it was keeping itself informed on the union activities of these employees.[7]

The credited testimony shows too that Sugarman told Thomas Hall in mid-January to keep him informed about the efforts of the employees to bring in a union and that Sugarman extracted from McShalo in late January a promise to vote against the Union.

The credited testimony of Hall and Loftman establishes that Sugarman's wife, while shouting at them along with Sugarman himself, stated that the store would be closed if the Union got in. Sugarman's conduct underscored that statement and there is no evidence that he at any time made any effort to negate it. In those circumstances, Respondent is to be held responsible for that threat.[8]

The evidence also establishes that Loftman's working hours were summarily reduced after the election and that Respondent gave him no reason for that action. Sugarman's attempt to account for that reduction was unconvincing. He explained that he originally had increased Loftman's working hours because Loftman had requested it and that he reduced them after the election to Loftman's "normal" hours because he was not needed. No explanation was offered to show why the schedule Loftman worked just prior to the election was not "normal." The evidence rather indicates that that was his normal, permanent schedule then. Sugarman's failure to have explained to Loftman after the election why he could not continue to work that schedule suggests to me that the reason was not based on economics. Sugarman offered no explanation at the hearing in this case as to why he could accommodate Loftman's request before the election for more hours of work and why he could no longer do so after the election had been held.

The testimony of Loftman made out a *prima facie* case for the General Counsel that his work hours were reduced after the election to discourage support for the Union, particularly as Sugarman on more than one occasion threatened reprisals against the part-time employees to induce them to abandon their support for the Union. Respondent's effort to rebut that *prima facie* case at best suggests that it may also have an economic basis for having reduced Loftman's working hours but it made no effort to demonstrate that his hours would have been reduced notwithstanding the evidence of unlawful motivation. In these circumstances, I find that Loftman's working hours were reduced after the election in order to discourage support for the Union.[9]

As to the allegations that Respondent threw out employee lunches and searched employee smock jackets in order to discourage union support, the credited evidence discloses only suspicious circumstances and is insufficient to establish that Respondent's motivation was discriminatory in nature. Suspicions alone are not enough to prove a violation.[10] For substantially the same reason, I find that the evidence is insuffcient to demonstrate that Sugarman discriminatorily asked McShalo for a doctor's note in early March to excuse a 1-day absence due to illness. In that regard, the evidence is clear that McShalo

[7] See *Clements Wire and Manufacturing Company, Inc.*, 257 NLRB 206 (1981).

[8] See *Berger Transfer and Storage, Inc.*, 253 NLRB 5, 12 (1980).

[9] *Century Moving & Storage, Inc.*, 251 NLRB 671, 678 (1980).

[10] *The Murray Ohio Manufacturing Company*, 207 NLRB 481 (1973).

was not *required* to furnish the note; the matter was not pursued.[11]

I find also that Sugarman's inquiry of Union Representative Ferrara on January 10 as to whether pharmacist Donald Barbakoff signed a union card is not independently coercive as to employees' Section 7 rights as no employees were present then.[12]

2. Alleged discrimination against Barbakoff

The first allegation raised by the General Counsel as to unlawful discrimination by Respondent against Barbakoff is that he was given more onerous, less agreeable tasks to discourage activities on behalf of the Union. A careful reading of Barbakoff's testimony reveals that he asserted that the work assignments he received never changed but that Sugarman's attitude in dealing with him changed in that Sugarman became openly hostile to him after he received the Union's letter demanding recognition. The credited evidence however shows that Sugarman had become increasingly critical of Barbakoff before he, Sugarman, was made aware of the Union's organizing activities and that it appears to have been the change in Sugarman's attitude toward Barbakoff that induced Barbakoff to contact the Union in late December. In short then, the credible evidence is insufficient to establish that Barbakoff was assigned more onerous, less agreeable duties because he supported the Union.

The General Counsel also has alleged that Respondent discharged Barbakoff on January 24 to discourage support for the Union. In support thereof, evidence was offered to establish, as it clearly did, that Barbakoff was the employee who initiated the Union's drive, that Sugarman made a specific inquiry as to whether or not he had signed a union card when the Union's representative, Ferrara, visited the store on January 10, that Respondent thereafter committed a series of acts coercive of employees' rights under Section 7 and that Barbakoff's employment with Respondent ended about 2 hours before he was scheduled to finish his workday on January 24. The credited evidence is that he was discharged from Respondent's employ on January 24 and that he did not quit. I note too that Sugarman had told one employee that a "vengeful" person was trying to bring the Union in and that Sugarman had, but a few days before that, placed an advertisement in the New York Times for a full-time or part-time pharmacist "who must be happy." Based on the evidence as to the nature of Barbakoff's activities for the Union, Sugarman's concern therefor, the union *animus* expressed by Sugarman, the fact of Barbakoff's discharge only 2 weeks after the Union demanded recognition and the pretextual reason given by Respondent respecting Barbakoff's termination of employment, I find that Barbakoff was discharged on January 24 because of his activities in support of the Union.[13]

As noted earlier Respondent has indicated that Barbakoff forfeited any right he may have had to reinstatement to his former position because he tricked Sugarman on February 6 into walking in front of his car and then struck Sugarman with his car. The General Counsel had offered testimony by Barbakoff to show that Sugarman was entirely at fault for that incident. Also, as noted above, I have rejected both of these versions and accepted instead that of Maria Kaufman.

Relevant to determining whether Barbakoff should be reinstated to employment with Respondent are several factors, pro and con. Obviously, the first in his favor is that he had been unlawfully discharged. Second, his application for unemployment benefits was improperly held up by Sugarman's fabrication that Barbakoff had quit. Third, after his discussion with Sugarman on February 6, he did attempt to leave the premises peacefully by simply driving away. Fourth, Sugarman was the one who blocked his egress and then resisted Barbakoff's initial effort to nudge him away from the front of the car. Fifth, it was Sugarman who climbed onto the car, as best as I can determine from the overall situation, and thereby dared Barbakoff to drive out onto Hillside Avenue, notwithstanding the fact that Barbakoff was already in a state of anger.

The factors weighing against a reinstatement order are the following. Barbakoff went to the pharmacy on February 6 to confront Sugarman when the result would be that he would be able, at best, to vent his own anger and, at worst, there could have been serious injury. Second, Barbakoff was maneuvering an automobile against a mere human who also was in his later years.

Misconduct after discharge may warrant denial of a reinstatement order, depending on the nature of the misconduct, the provocation, if any, and the likelihood that it will lead to future strained relations on the job if the employee is returned to work.[14] I view the misconduct of Barbakoff in driving Sugarman out onto a six-lane road as serious in nature. I view the provocation of that act by Sugarman as equally serious under the circumstances.[15] It is also patently clear to me that a resumption of relations between them should not be ordered as those relations would be strained, to put it mildly. The policies of the Act will not be served by permitting a party to be absolved of all responsibility when its own acts materially contributed to the result. A proper balance will be struck by requiring Respondent to make Barbakoff whole for all monetary losses he suffered from his discharge on January 24 until he obtained substantially equivalent employment elsewhere.[16]

III. THE REPRESENTATION CASE

The Board's order in Case 29-RC-5255 directed that a determination be made as to whether Barbakoff's ballot should be counted. His ballot is determinative of the election results. As I have found that he was discrimina-

[11] Cf. *Central Cartage, Inc.*, 236 NLRB 1232, 1256 (1978).

[12] Cf. *Sibilo's Golden Grill, Inc.*, 227 NLRB 1688, 1692-93 (1977).

[13] Cf. *Publishers Printing Co., Inc.*, 233 NLRB 1070 (1977).

[14] See *Booth Services, Inc.*, 206 NLRB 862, 872 (1973), and cases cited at 872 in fn. 24.

[15] Cf. *J. W. Microelectronics Corporation*, 259 NLRB 327 (1981).

[16] Cf. *Atlantic Company*, 79 NLRB 820, 828, fn. 17 (1948), where the Board fashioned a remedy, in lieu of the usual one, because the discriminatorily discharged employee had, by reason of his actions while discharged, lost his right to reinstatement to his former job. The backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

torily discharged on January 24 but that he was not entitled to reinstatement to employment in the unit involved in Case 29-RC-5255 since February 6, I conclude he was not employed in that unit as of the date of the election, February 27. Accordingly, his ballot should remain unopened and uncounted.

The Board's order further directed that a determination be made as to whether Objections 1, 2, and 6, filed by the Union, have merit. These objections pertain to alleged unlawful interrogation by Respondent, threats to lay off its part-time employees, and threats to close if the Union won and to other alleged acts and conduct of improper interference with the employees' right to choose freely whether or not they wished to be represented for purposes of collective bargaining by the Union. Those other alleged acts and conduct related to allegations of harassment, of creating the impression of surveillance of union activities, and of informing employees that dues would be deducted from their pay if the Union won.

As I have concluded that Respondent engaged in unlawful acts, as detailed above, and as these fall within the scope of Objections 1, 2, and 6, I recommend that the Board find that those acts interfered with the employees' free choice, that the results of the February 27 election be set aside, and that a new election be held.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees as to their support for the Union, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. By promising wage increases and medical benefits to employees to induce them to vote against the Union and by telling them they will be rewarded if they reject the Union, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

5. By threatening to discharge part-time employees, threatening to close the store, threatening to reduce the amount of employees' paychecks, and threatening not to honor employee requests to be excused from work with the object of such threats being to discourage employees from supporting the Union, Respondent has engaged in and is engaging in unfair labor practices proscribed in Section 8(a)(1) of the Act.

6. By granting employees purchasing discounts in excess of the normal discount in order to discourage their support for the Union, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

7. By creating the impression among its employees that it has kept their union activities under surveillance, Respondent has engaged in, and is engaging in, unfair labor practices proscribed by Section 7 of the Act.

8. By requesting employees to keep it informed as to any activities of its employees for the Union and by extracting promises from employees not to vote for the Union, Respondent has engaged in, and is engaging in, unfair labor practices proscribed by Section 7 of the Act.

9. By reducing the work hours of employee Brian Loftman in order to discourage membership in the Union, Respondent has engaged in, and is engaging in, unfair labor practices proscribed by Section 8(a)(1) and (3) of the Act.

10. By having discharged pharmacist Donald Barbakoff from its employ on January 24 and by having failed to reinstate him by February 6, or make him whole for all losses of moneys since January 24 because he joined and supported the Union, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

11. The unfair labor practices committed by Respondent demonstrate that it has a propensity to violate the Act and therefore a broad remedial order is warranted.[17]

12. The unfair labor practices set out above in paragraph 3 to 10 inclusive affect commerce within the meaning of Section 2(6) and (7) of the Act.

13. Respondent did not, in order to discourage membership in the Union, prevent employees from bringing lunch to work, or throw away employee lunches, did not search employee smock jackets, did not require employees to furnish doctors' notes to excuse absences due to illness, or assign more onerous, less agreeable tasks to employees and, as a consequence, the allegation of the complaint that it did so in violation of Section 8(a)(1) and (3) of the Act must be dismissed.

14. The challenged ballot of Donald Barbakoff shall remain unopened and uncounted as he was not employed on the date of the election as an employee within the unit found appropriate in Case 29-RC-5255.

15. The results of the election held on February 27 shall be set aside and a new election directed by reason of the acts set out above in paragraphs 3 through 11.

Upon the foregoing findings of facts, conclusions of law, and recommendations, and pursuant to Section 9 and 10(c) of the Act, I hereby issue the following recommended:

ORDER[18]

The Respondent, Hillside Avenue Pharmacy, Inc., Jamaica, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees as to their support for District 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale, Department Store Union, AFL-CIO.

(b) Promising wage increases or other benefits to employees to induce them not to support the Union.

(c) Threatening to discharge its part-time employees, to close its store, to reduce employees' working hours or

[17] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

to refuse requests by employees for time off in order to discourage its employees from joining or supporting the Union.

(d) Granting extra purchasing discounts to its employees to induce them to vote against the Union.

(e) Creating the impression among its employees that it is keeping their union activities under surveillance.

(f) Requesting its employees to keep it informed as to union activities among them or extracting promises from its employees to vote against the Union.

(g) Reducing the work hours of any of its employees or discharging any employee to discourage membership in or activities on behalf of the Union.

(h) In any other manner interfering with, restraining, or coercing its employees with respect to the exercise by them of any of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action:

(a) Make whole Brian Loftman for all losses of pay he suffered as a result of the reduction in his work hours after the election and make whole Donald Barbakoff of all losses of pay he suffered as a result of his discharge on January 24; backpay for Loftman and Barbakoff is to be computed in the manner set forth above in footnote 17 of this Decision.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records and reports, and all other records necessary to analyze the amounts of backpay due herein.

(c) Post at its New York, New York, pharmacy copies of the attached notice marked "Appendix."[19] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any materials.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order what steps have been taken to comply herewith.

IT IS FURTHER RECOMMENDED that the allegations of the complaint which pertain to the matters set out in paragraph 13 of the Conclusions of Law section of this Decision are dismissed.

IT IS FURTHER RECOMMENDED that the challenge to the ballot of Donald Barbakoff should be sustained; Objections 1, 2, and 6 filed by the Union with respect to conduct affecting the results of the election held on February 27, 1981, in Case 29-RC-5255 are sustained, and a new election shall be directed.

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[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."